85-1294

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EUGENE A. LEBER, et al.,

Petitioners,

vs.

STEVEN A. SMITH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals, within six months after a dispositive pronouncement on a Fourth Amendment issue by the United States Supreme Court, may issue an opinion which not only ignores the holding of the Supreme Court but also adopts a test totally inconsistent with that posited by the Supreme Court.

2. Whether, in determining the reasonableness of a Fourth Amendment seizure resulting in an unintended police shooting of a non-criminal victim, a court may look only to the reasonableness of the officer's action in drawing the gun, without regard to the totality of the circumstances surrounding the seizure.

3. Whether, in asserting the reasonableness of a Fourth Amendment seizure in the context of a Civ.R. 56 summary judgment motion, a trial court or appellate court is permitted to pick, choose, and interpret factual issues and to draw interpretations from those factual issues favorable to the movants.

Petitioners in this case are Eugene A. Leber, Richard P. Leber, and June M. Leber. Steven A. Smith; Sheriff, Erie County, Wanda June Gladwell, Admx.; and Board of Erie County Commissioners are Respondents.

SUBJECT INDEX

Questions Presented 1

Table of Authorities. 3

Petition for a Writ 5

Opinions Below. 6

Jurisdiction. 8

Constitutional Provisions and Statutes Involved. 9

Statement of the Case 10

Basis for Federal Jurisdiction. 16

Argument. 16

Appendix A-District Court Magistrate's Report and Recommendation. 30

Appendix B-District Court Order 76

Appendix C-Court of Appeals Opinion . . .83

Appendix D-Court of Appeals Order . . 100

Certification 103

TABLE OF AUTHORITIES

Cases

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 26

Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) 18

Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) 18

Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) 18

Hayes v. Florida, ____ U.S. ____, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) 18

Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) 19

Leber v. Smith, 773 F.2d 101 (1985) 19, 20, 23

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) 18

Tennessee v. Garner, ____ U.S. ____, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) 17-20, 22, 28

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). . . .18

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). 16

United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) 25, 26

United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). 16

United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) 18

United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) 17, 18

Winston v. Lee, ____ U.S. ____, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) 18

Statutes

Federal Statutes:

Constitution of the United States, Fourth Amendment. 16, 17, 19, 21, 22

Constitution of the United States, Fourteenth Amendment. 17

Federal Rule of Civil Procedure 56 . . . . . .25, 27

42 U.S.C. Section 1983 19

SUPREME COURT OF THE UNITED STATES

October Term, 1985
No. _____

EUGENE A. LEBER; RICHARD P. LEBER;
and JUNE M. LEBER,

Petitioners,

vs.

STEVEN A. SMITH, Sheriff, Erie
County, WANDA JANE GLADWELL, Admx.;
BOARD OF ERIE COUNTY COMMISSIONERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, Eugene A. Leber, Richard P. Leber, and June M. Leber, respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of

Appeals for the Sixth Circuit rendered in these proceedings on September 20, 1985. Petitioners' motion for rehearing was denied by the Sixth Circuit Court of Appeals on November 6, 1985.

OPINIONS BELOW

The report and recommendation of the United States Magistrate for the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A hereto. The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix B hereto. The opinion of the United States Court of Appeals for the Sixth Circuit has been reported as Leber v. Smith, 773 F.2d 101 (6th Cir. 1985), and is printed as Appendix C

hereto. A November 6, 1985, order of the United States Court of Appeals for the Sixth Circuit denying petitioners' motion for rehearing and modifying the September 20, 1985, opinion of the court has not been reported and is printed as Appendix D hereto.

JURISDICTION

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Eugene A. Leber, et al. v. Steven A. Smith, et al., Case No. 83-3387, entered September 20, 1985. That judgment affirmed the judgment of the United States District Court for the Northern District of Ohio, Western Division, entered April 29, 1983, granting defendants' motion for summary judgment. Petitioners timely filed petition for rehearing was denied by the appellate court on November 6, 1985.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case is before this Honorable Court on a petition for writ of certiorari from a decision of the United States Court of Appeals for the Sixth Circuit affirming a district court grant of summary judgment in favor of respondents in a 42 U.S.C. Section 1983 action.

On April 7, 1979, a rural Ohio teenager, Eugene A. Leber, was rendered permanently paraplegic when he was shot in the back by a county sheriff's deputy as he sat motionless behind the wheel of his stopped automobile waiting for an officer to approach. The deputy contended his weapon discharged while he was running in the dark toward the boy's car with the gun drawn and his finger in the trigger housing. The deputy averred that during this seizure process he slipped on ice and stumbled, causing his .357 Magnum to fire.

Prior to the shooting, Gene Leber's brother, Richard, told the deputy that Gene was not violent or dangerous; that Gene did not have a gun; and that their father did not permit guns. Richard did not, contrary to the appellate court opinion, tell the deputy Gene had been

drinking or that Gene was suicidal or emotionally disturbed. Richard told the deputy Gene was not on medication or drugs and that he wanted his younger brother brought home simply because he was concerned.

When the defendant deputy arrived at the scene of the vehicular stop, two fellow officers had already exited their cruisers, focused a spotlight on Gene, drawn their revolvers, and taken a position of cover. While one officer was in the process of issuing initial commands to Gene, the deputy got out of his car on the run before it had completely stopped, while at the same time drawing his modified and never tested firearm from its holster. While running on the dark berm around the opened door of his still moving vehicle toward the boy's car, the deputy said he slipped or stumbled on

ice, accidentally sending a bullet into Gene Leber's back.

Plaintiffs (Gene and his parents) argued at the trial court level that the deputy's actions constituted an unreasonable seizure, violative of the Fourth Amendment to the Constitution of the United States and a Fourteenth Amendment substantive due process violation. Supporting their position was the testimony of Dr. George L. Kirkham, an eminent expert in the fields of criminology and law enforcement, who stated:

> The actions of Deputy Smith on the night of April 7, 1979, culminating in the shooting of plaintiff, were grossly unprofessional and irresponsible; demonstrated an utter disregard for the lives and safety of those in the area surrounding Deputy Smith when he wielded his weapon; and constituted a serious departure from well-established, recognized, and accepted police procedures followed by law enforcement agencies throughout the United States.

In a thorough, well-reasoned Report and Recommendation, the United States Magistrate, following careful review of all the evidence, concluded:

> * * *I have no doubt that the question of whether Deputy Smith acted reasonably or unreasonably [in his seizure of Leber] is for the jury.

Nevertheless, the district court granted defendants' summary judgment motion on the Section 1983 issue, finding no deprivation of plaintiff's constitutional rights.

The appellate court properly determined:

1. * * *a basis of Leber's [substantive] due process claim is that the seizure was unreasonable in violation of the Fourth Amendment.

2. * * *the officers were engaged in a "seizure" of Leber as that term is used in the Fourth Amendment.

3. * * *apprehension by the use of deadly force is a seizure subject to the reasonableness

> requirement of the Fourth Amendment.
>
> 4. The issue . . . is whether Deputy Smith's actions were "reasonable" under the Fourth Amendment.

The Court of Appeals then made an egregious error by asking, as the determinative question, not whether Smith's actions of running in the dark toward Leber with his finger in the trigger housing of a loaded gun, slipping on ice and shooting the teenager, constituted an unreasonable seizure but whether the deputy "acted reasonably in drawing his gun." Since all parties agreed Smith did not act unreasonably merely by the isolated act of drawing his gun, the court concluded plaintiffs "failed to establish a substantive due process violation." Accordingly, the appellate court affirmed the trial court's grant of summary judgment against Smith on the Section 1983

claim. On November 6, 1985, the court denied plaintiffs' petition for rehearing, modifying only a single sentence from its earlier opinion.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based on 28 U.S.C. Sections 1331 and 1343 and 42 U.S.C. Section 1983.

ARGUMENT

The Fourth Amendment to the Constitution of the United States expressly guarantees:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . .

Whenever a law enforcement officer restrains the freedom of a person to walk away, he has seized that person. United

States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment, which is made applicable to the states by the due process clause of the Fourteenth Amendment. Tennessee v. Garner, ____ U.S. ____, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). In determining the reasonableness of a search, the nature and quality of the intrusion on the individual's Fourth Amendment interests must be balanced against the importance of the governmental interests alleged to justify the intrusion. United States v. Place, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); Tennessee v. Garner,

supra, 85 L.Ed.2d 7. Reasonableness depends not only on when a seizure is made but how it is carried out. United States v. Ortiz, 422 U.S. 891, 895, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); Terry v. Ohio, 392 U.S. 1, 28-29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The question is whether the totality of circumstances justified a particular sort of seizure. Tennessee v. Garner, supra, 85 L.Ed.2d 8; United States v. Place, supra; Winston v. Lee, ____ U.S. ____, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); Hayes v. Florida, ____ U.S. ____, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); Schmerber v. California, 384 U.S. 757, 86

S.Ct. 1826, 16 L.Ed.2d 908 (1966); Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

The appellate court correctly determined that the critical query in this 42 U.S.C. Section 1983 action was whether, as he engaged in the seizure of Gene Leber, the deputy's "actions were 'reasonable' under the Fourth Amendment". Leber v. Smith, supra, at 105.

Having properly determined the goal of the dispositive question, the appellate court prejudicially and unfairly framed the question itself by directing it solely to the deputy's action in initially drawing his gun rather than the acts which followed that constituted the "seizure" of Gene Leber. The court did not inquire, as this Honorable Court's holding in Tennessee v. Garner, supra, required it to, whether the deputy's

actions in running over unfamiliar terrain, in the dark, with gun drawn and finger in the trigger housing, in a manner that caused the deputy to slip on ice and discharge a round into the back of a motionless teenager, were reasonable under all the circumstances. The appellate court, instead, looked only to the single issue of whether the deputy "acted reasonably in drawing his gun". Leber v. Smith, supra, at 105. It either unknowingly or intentionally failed to utilize a totality of the circumstances test, patently violating the rule of law this Court reaffirmed less than six months earlier in Tennessee v. Garner, supra.

The impact of the appellate court's error was devastating since petitioners did not dispute that the deputy acted reasonably in drawing the gun, as did the other officers at the scene of the stop.

Those other officers, however, remained in stationary positions under the cover of their vehicles and began attempting to initiate communication with the Leber youth. Petitioners do not contend that this action was at all unreasonable under all of the circumstances. It was the action of the deputy after he drew his weapon that gave rise to the proper Fourth Amendment "reasonableness" inquiry. In light of the efforts of the other officers in attempting to communicate with Leber and in remaining at stationary positions at their vehicles, and in light of the complete lack of motion on the teenager's part, did the deputy's acts in running toward the Leber car over unfamiliar terrain, in the dark, with finger in the trigger housing, and slipping on ice so as to discharge the weapon and shoot Leber, constitute a "reasonable"

Fourth Amendment seizure? By misstating the critical question and, consequently, ignoring the totality of the circumstances and this Court's Tennessee v. Garner, supra, decision, the Court of Appeals formulated an answer that was not determinative of the constitutional issue, reached the wrong result, and left unremedied the egregious Fourth Amendment violation that rendered Gene Leber permanently paraplegic.

As is clear from the opinion itself, the Court of Appeals considered only the affidavit and deposition testimony of the deputy in determining the reasonableness (of drawing the gun) issue. Not only did the court not consider the totality of the circumstances, but the court also ignored evidence offered by plaintiffs on the reasonableness issue; confused existing facts; and strove, in an appeal from

a grant of summary judgment to defendants, to construe selected facts most strongly against the party opposing the motion--the Lebers. For example:

1. The court below improperly characterized Eugene Leber as intoxicated. Leber v. Smith, supra, at 105. It was Gene's brother, Richard (the sole source of the seizing officer's information), who was intoxicated, not Gene.

2. Smith was never told Gene was suicidal or emotionally disturbed. Gene was neither; yet the court below concluded the deputy acted reasonably in drawing his gun because the boy was "emotionally disturbed [and] possibly suicidal". Leber v. Smith, supra, at 105.

3. The Court of Appeals concluded that the deputy acted reasonably in drawing his gun because it was dark. Leber v. Smith, supra, at 105. The court

failed to note that both Gene Leber and his car were bathed in a police spotlight.

4. The appellate court, in assessing the reasonableness of the deputy drawing his gun, omitted reference to the fact that, after he stopped his car, Gene, rather than simply going around the partial roadblock, sat motionless in his vehicle, waiting for an officer to approach.

5. The court below, in assessing reasonableness, failed to make even a passing reference to the affidavit testimony of plaintiffs' eminent law enforcement and criminology expert, Dr. George L. Kirkham, who, according to the Magistrate, relied "on a wealth of discovery material" and concluded:

> The actions of Deputy Smith on the night of April 7, 1979, culminating in the shooting of plaintiff, were grossly unprofessional and irresponsible; demonstrated an utter disregard

> for the lives and safety of those in the area surrounding Deputy Smith when he wielded his weapon; and constituted a serious departure from well-established, recognized, and accepted police procedures followed by law enforcement agencies throughout the United States.

These oversights, misapprehensions, and misstatements are particularly striking in light of the fact that summary judgment was entered against plaintiffs by the court below.

In a per curiam opinion in United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962), this Court stated:

> On summary judgment the inferences to be drawn from the underlying facts contained in [Civ.R. 56 evidentiary] . . . materials must be viewed in the light most favorable to the party opposing the motion.

Where a study of the record in this light leads to the belief that inferences contrary to those drawn by the trial court

might be permissible, this Court opined, a genuine issue of material fact is raised; and it is improper for a lower court to enter summary judgment for the moving party. This Court, similarly, when confronted with a petition for certiorari, must, in light of the trial court grant of summary judgment to defendants in the instant case, accept plaintiffs' version of the facts. Bishop v. Wood, 426 U.S. 341, 347, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

The appellate court's opinion relied exclusively on the affidavit and deposition testimony of Deputy Smith in determining the "reasonableness" issue and omitted all reference to facts and expert testimony favorable to the plaintiffs. Such a fact selection foray is manifestly inconsistent with this Court's Diebold, supra, decision. Courts cannot, consist-

ent with Civ.R. 56, interpret the available evidence in favor of the movant; cast aside evidence unfavorable to the movant's position; and resolve disputed issues of material fact in order to summarily deprive the non-movant of his opportunity to present his case to the trier of fact. This is precisely what occurred in the case at bar.

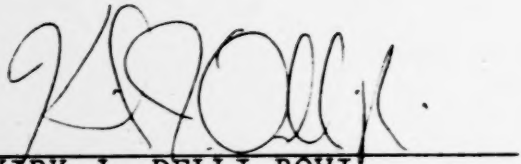
When this Court issues a pronouncement on a constitutional issue, it expects lower court adherence to, and implementation of, that pronouncement. This is what renders the decisions of this Court efficacious. When stare decisis and precedent cease to have value and the lower courts begin to march to the beat of their own drummer, the legal system begins to break down and justice erodes. Unless this Court recognizes that its responsibility includes not only

deciding important questions of law but also assuring that its decisions are followed by the lower courts, grave injustices, such as those perpetrated on petitioners, will result. The appellate court's failure to abide by this Court's Tennessee v. Garner decision, coupled with its abandonment of the stringent requirements necessary to sustain a summary judgment motion, led the lower court to a clearly erroneous, unjust result which must not go uncorrected.

For these reasons, petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DENNIS E. MURRAY



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APPENDIX A

Magistrate's Report and Recommendation

(Filed January 17, 1983)

Case No. C79-288

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Western Division

EUGENE A. LEBER, et al.,

Plaintiffs,

vs.

STEVEN A. SMITH, et al.,

Defendants.

This is an action brought by the plaintiff Eugene A. Leber and his parents as a result of the accidental shooting of Leber by the defendant Steven A. Smith, who, at the time, was an Erie County, Ohio, Deputy Sheriff. The plaintiffs have sued Deputy Smith, the County Sheriff at the time of the shooting, Harold

Gladwell, and the Erie County Board of Commissioners. All defendants have moved for summary judgment and their motion has been referred to the undersigned for a Report and Recommendation. For the reasons which follow, I recommend that the motion for summary judgment be granted in part as to the Erie County Board of County Commissioners, but that it be otherwise denied as to them and Deputy Smith and Sheriff Gladwell.*

A.

Factual Background

The events leading to this lawsuit began in the early morning hours of April 7, 1979, when the plaintiff returned home and awoke his brother. The

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*A suggestion of death as to Sheriff Gladwell was filed on March 3, 1982, and the administratrix of his estate was substituted as a party defendant on July 21, 1982. For convenience, however, this defendant will be referred to as either the Sheriff or "Gladwell".

brother became concerned about the plaintiff's condition, and the Sheriff's Department was notified about a possible suicide at the Leber residence.

In response to this information, the defendant Smith and another Deputy Sheriff, Barrett, went to the plaintiffs' house. Shortly before their arrival (in separate cars), the plaintiff drove away. His brother told the officers that the plaintiff had been acting "real crazy", and that he was concerned that he might kill himself. The record is conflicting on the question of whether the brother told the officers, or either of them, that he believed that the plaintiff might have a weapon. (Barret (sic) Dep. at 3; Smith Dep. at 20-21, 31).

The officers set off to look for the plaintiff; eventually he was sighted, and a high speed chase ensued (the record

also contains conflicting testimony about the speed of the chase). A Milan, Ohio, police officer, alerted by radio, set up a partial roadblock, and this caused the plaintiff to stop his car. Thereupon Deputy Barrett pulled up directly behind the plaintiff's car. He got out of his car with his gun drawn, but not pointed at the plaintiff. Barrett ordered the plaintiff to get out of his car, but the plaintiff made no response. A spotlight was trained on the plaintiff.

At this point, the defendant Smith arrived in his vehicle, which he stopped parallel to Barrett's car (which was behind the plaintiff's car). Exiting his car, Smith drew his pistol (a .357 Magnum, which he had not previously fired, though it had been fitted with a trigger shoe for smoother operation when being fired). (Smith Dep. 26, 3-4). He started around

the front of his vehicle; at that point he slipped on a patch of ice, stumbled, and discharged his weapon accidently. The plaintiff was struck with the discharged bullet; as a result, he is permanently paralyzed from the waist down.

There is no dispute that Smith did not intend to fire his weapon at the plaintiff. As he exited the car, it was not aimed at the plaintiff, and, but for Smith's slipping on the ice, the pistol would not have fired.

B.

Smith's Liability under § 1983

In support of his request for summary judgment, Deputy Smith contends that he cannot be liable under 42 U.S.C. § 1983 for his negligent acts; rather, he asserts that § 1983 liability can be imposed only for "gross and culpable negligence", or a similarly high degree

of indifference to the plaintiff's safety and welfare. The plaintiff, on the other hand, argues that Deputy Smith can be held liable to him for his injuries upon a determination that he was negligent.

In Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollan, 443 U.S. 137 (1979), the Supreme Court granted certiorari on the question of whether negligent conduct under color of state law could lead to liability under § 1983. The Court failed, however, to reach a definitive answer in either case, and it noted in Baker "that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush." Id. at 139.

Thereafter, the Court acknowledged that its opinions in Procunier and Baker "have not aided the various Courts of

Appeals and District Courts in their struggle to determine the correct manner in which to analyze claims . . . which allege facts that are commonly thought to state a claim for a common-law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation and relief is sought under § 1983." Parratt v. Taylor, 451 527, 533 (1981). In Parratt, which involved the negligent loss by prison officials of "hobby kits" belonging to the plaintiff, the Court pointed out that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." Id. at 534. This, the Court indicated, supports the suggestion "that § 1983 affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting

under color of state law without any express requirement of a particular state of mind." Id. at 535.

At this point, however, the Court did not expressly state or hold that an allegation of negligent conduct, which caused some injury to some constitutional right, was sufficient to state a cause of action under § 1983. Rather, the Court directed its focus on the question of whether the plaintiff's complaint about the loss of his hobby kits established that a constitutional right had been pled; the Court did not, therefore, further elaborate upon the question of whether conduct which was simply negligent could lead to liability under § 1983.

In its opinion in Parratt, the Court stated expressly that the "initial inquiry must focus on whether the two essential elements to a § 1983 action are

present: (1) [state action]; and (2) whether [the] conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Id. at 535. In light of this observation, and the rather abrupt manner in which the Court in Parratt terminated its discussion of the question of negligence and § 1983 liability, I conclude that determination of the issues raised by the defendant's motion for summary judgment must pursue a different path from that pointed to by the parties.

They contend that the determinative issue is whether negligence is sufficient to establish § 1983 liability. There being no conclusive decision on this issue, either from the Supreme Court or the lower courts which have grappled with it, I am persuaded that asking a

different question might lead to a more adequate answer, and that that question is suggested by the directive in Parratt to consider at the outset whether the alleged conduct--regardless of the actor's state of mind--deprived the plaintiff of rights secured under the Constitution. In other words, I suggest that a) the inquiry should begin with examining the constitutional right which the plaintiff claims to have been abrogated, and b) the remedy under § 1983 should adopt the contours of the particular right.

In this case, that right, ultimately, is the Fourth Amendment "right of the people to be secure in their persons, . . ., against unreasonable searches and seizures". There can be no argument that the officers, including Deputy Smith, were engaged in a "seizure" of the

plaintiff, as that term is used in the Fourth Amendment. See generally Mendenhall v. United States, 446 U.S. 544, 554 (1980) (seizure occurs when a person's freedom of movement is restrained in a significant way, so that he is not free to go). Whether on the basis of the traffic offenses which they had observed, or as a result of a concern that the plaintiff might be dangerous to himself, the officers were undertaking to prevent further flight by the plaintiff and take him into custody.

It is also clear that Deputy Smith was participating in this process, as the effort to seize the plaintiff was continuing at the time he arrived in his car. Though instructed to do so, plaintiff had not left his vehicle (Attachment 2, p. 8), and events with reference to plaintiff's being seized were continuing to unfold.

Because the function being performed by Deputy Smith at the time the plaintiff was shot is regulated directly by a constitutional proscription, and because that constitutional proscription expressly sets its own standard of conduct by prohibiting "unreasonable seizures" the question of whether Smith's action was negligent, deliberately indifferent, or willful and wanton is not determinative. Rather, where, as here, an officer is performing a police function which falls within the express confines of the Fourth Amendment, the determination of liability depends upon whether the means selected by Deputy Smith and the manner in which those means were employed as he participated in the seizure of the plaintiff were "unreasonable."

At first blush the distinction which I suggest be drawn by this court between

the negligence standard and the reasonableness standard may not appear to be either significant or helpful. Aside, however, from the fact that the term "unreasonable" is used in the Amendment itself, other considerations justify this approach, and make it considerably more helpful in the effort to unravel the problem presented by the defendant's motion. Perhaps most importantly, it would avoid the concern that § 1983 would (if simple negligence were the standard for liability) become "a font of tort law." Paul v. Davis, 424 U.S. 693, 701 (1976). The Supreme Court has repeated this concern in other cases. See Parratt v. Taylor, 451 U.S. 527, 544 (1981).

Its opinions have not, however, followed the path which I suggest be taken by this court. Had they done so, and imposed a reasonableness standard

under the Fourth Amendment in cases involving seizure of either persons or property, then the apprehension about unlimited civil rights actions based on claims of negligence by police officers and other officials could have been lessened.

Under the approach which I am suggesting, for example, a police officer who drives negligently while on routine patrol and injures a citizen would not be liable under the Fourth Amendment. This would be true even if the injuries were as severe as those suffered by the plaintiff in this case, and even if the officer had a more culpable state of mind at the time they were inflicted. No liability would arise in the hypothetical situation because, unlike this case, the officer at the time was not performing a function which is directly regulated by

the Fourth Amendment: he was not undertaking to seize his victim. Therefore, his conduct is outside the scope of the Fourth Amendment, and no liability would ensue under § 1983, no matter how egregious his actions might otherwise have been. See Paul v. Davis, supra, 424 U.S. 693, 698 (1976) (no cause of action under § 1983 for negligent operation of a police vehicle) (dictum).

Though no case could be found which adopts or endorses the approach which I am suggesting, there are indications in a number of cases that it would be acceptable and appropriate. In Baker, for example, the Supreme Court stated, as it was to repeat in Parratt, that "[t]he first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" If not, the Court

emphasized, there is no need to be concerned about the officer's state of mind: "If there has been no such deprivation [of a constitutional right], the state of mind of the defendant is wholly immaterial." 443 U.S. at 140.

Applying this statement to the proposal that this court adopt a reasonableness standard in this case, the issue then becomes whether, as he was participating in the seizure of the plaintiff, Deputy Smith's actions were reasonable in light of all the circumstances as they appeared to him at the time. This issue is clearly disputed, and is one which can only be decided by the jury.

Other cases also support this approach, though not discussing it explicitly. In Shillingford v. Holmes, 634 F.2d 263, 264-66 (5th Cir. 1981), the Fifth Circuit stated:

Because § 1983 is not a general tort statute but imposes liability only for rights secured by the Constitution and laws of the United States, it does not grant a cause of action for every injury wrongfully inflicted by a state officer . . .

The right to be free of state-occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process. The right also has been premised on the fourth amendment guarantee ["to be secure in their persons"] made applicable to the states by the fourteenth amendment . . .

[To determine] whether the state officer has crossed the constitutional line . . ., we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice or an unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be remedied under § 1983 . . .

> Actions permissible in controlling a riotous mob or in dealing with a life-threatening situation might weigh differently when taken against a peaceable pedestrian. (citations omitted).

In my opinion, Shillingford and cases which adopt the same approach, see, e.g., Wise v. Bravo, 666 F.2d 1328, 1333-34 (10th Cir. 1981), implicitly adopt the reasonableness standard recommended in this Report. If this approach is adopted by this court, then the officer's state of mind is considered only as a part of the overall circumstances by which the reasonableness of his conduct is judged by the jury. The court in Shillingford appears to view an "unwise excess of zeal" as an element which must be proved. If this reading of that case is correct, then it should not be followed completely: the state of mind (malice or "unwise

xcess of zeal") is relevant, but it is ot determinative.

There are, however, recent cases nvolving quite similar facts, which do ot take this approach. In Miller v. mith, 656 F.2d 337 (8th Cir. 1981), the laintiff was wounded by the accidental ischarge of the defendant officer's eapon as the officer was attempting to andcuff the plaintiff after the plain- iff had tried to escape. The district ourt found that the shooting was acci- ental (rather than intentional, as laimed by the plaintiff), and the Eighth ircuit held that there was no depriva- ion of a constitutional right: "negli- ent action resulting in personal injury oes not become a constitutional viola- ion merely because the tortfeasor is a tate or local police officer." Id. at 40 n.2. Similarly, in Polson v. City of

ee's Summit, 535 F. Supp. 555 (W.D. Mo. 982), where the plaintiff was hot "as a esult of . . . harried misjudgment", the ourt held that no liability ensued under 1983.

In both cases, the courts looked to ne officer's state of mind (as urged by ne parties in the instant case) as the ouchstone for determining liability for nootings. In my opinion, the same esult (i.e., judgment for the officers) ould have been reached by applying a easonableness standard: each case in-olved an effort at flight which had been roken off, and the shooting occurred in ircumstances which could lead a reason-ole trier of fact to conclude that the fficer had not acted unreasonably in the ourse of accomplishing the seizure of ne plaintiff. Thus, to the extent that

ither Miller or Polson might be seen as upportive of the defendant's motion for ummary judgment in this case, I would oint out that neither case viewed the ssue from the perspective which I urge his court to adopt.

Support of this perspective also erives from scholarly writings. For xample, one commentator has suggested hat:

> the proper analysis in determining whether negligence can be an appropriate standard of liability under Section 1983 is to reject any uniform rule and to focus instead on the elements of the particular constitutional claim being asserted . . .
>
> The constitutional provision containing the greatest textual support for a negligence standard of liability is the fourth amendment, which prohibits "unreasonable" searches or seizures. The concept of reasonableness under the fourth amendment is interpreted in

> light of constitutional policies and need not incorporate tort standards of negligence. At the same time, it would be inappropriate to read into it a requirement of malicious motive or intentionally wrongful conduct. If a police officer inflicts a negligently caused physical injury upon a person being arrested, this could be viewed as an "unreasonable seizure" within the meaning of the fourth amendment. Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement, 46 Cinn. L. Rev. 45, 64-65 (1977).

In summary, and in light of Prof. Kirkpatrick's suggestion, I recommend that the question of negligence in this case is to be subsumed into the general question of whether the officer's actions amounted to an "unreasonable seizure" under the Fourth Amendment. That is the standard set by that Amendment, and its implementation reduces, and may even eliminate the danger that the Fourth Amendment will become a font of tort law

leading to litigation every time an officer injures a citizen. Instead, the initial inquiry is whether the officer was engaged in a "seizure" or a search, or acts directed towards the plaintiff which are related to the performance of those two Fourth Amendment-regulated functions; if so, then liability is assessed if, in light of all the circumstances as they reasonably appeared to the officer at the time, the manner by which the seizure was undertaken was unreasonable.

In this case, I have no doubt that the question of whether Deputy Smith acted reasonably or unreasonably is for the jury. The defendant Smith not having established that he is entitled to judgment as a matter of law, I conclude that the motion for summary judgment on his behalf must be denied.

C.

Sheriff Gladwell's Liability

Defendants contend that Sheriff Gladwell can only be held liable if he specifically directed or personally participated in Eugene Leber's shooting. In support thereof defendants cite Wilson v. Beebe, 612 F.2d 275 (6th Cir. 1980), a brief per curiam opinion. In Wilson, the Sixth Circuit stated that police supervisory personnel cannot be held liable for failure to prevent the misconduct of their subordinates absent some showing of direct responsibility for the action. Id. at 276. Recently, the Sixth Circuit has elaborated on this principle and held that where police supervisory personnel either completely fail to train their subordinates or afford training that "is so reckless or grossly negligent that

future police misconduct is almost inevitable", liability may be imposed. Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir. 1982), cert. denied, ____ U.S. ____, 51 L.W. 3254 (10/5/82). In Hays, plaintiffs were beaten by individual officers during a demonstration and thereafter brought an action against the county and the chief and deputy chief of its police department. Plaintiffs' theory of liability was based on defendants' negligent training, supervision and control of the unidentified officers. Id. at 870-871. The trial court gave a jury instruction based upon simple negligence. Id. at 875. The Sixth Circuit rejected simple negligence as a standard for imposition of liability in this context. Significantly, however, the Court recognized that direct responsibility for subordinates' actions may be found where

the supervisory officials were grossly negligent in their duty to prepare those subordinates. Id. at 874. Apart from any considerations of training, however, it is clear that if a supervisory official creates a policy or custom which causes the improper conduct of the officer, liability will attach. Moreover, a custom or policy can be created by acts of omission as well as affirmative acts. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-691 (1978).

The Second Circuit has explained the distinction between a "failure to train" and a "custom or policy" theory of liability most clearly:

> [I]n the present case, a jury could find the individual appellees liable, not on the theory that these supervisory officials may be held responsible for the acts of agents

> which were negligent or contrary to instructions, but rather on the theory that it was the appellees' own conduct which resulted in the constitutional violations. It is not necessary for § 1983 liability that the appellees directed any particular action with respect to these particular individuals, only that they affirmatively provided a policy which sanctioned the type of action which caused the violations. In short this is not a case of indifference, that is, a failure to act in the face of misconduct by subordinates, but is rather a case of affirmative policy-making which may have caused this misconduct. Duchesne v. Sugarman, 566 F.2d 817, 831 (2nd Cir. 1977).

In Duchesne, the policy at issue was the Child Welfare Services failure to obtain court approval for emergency removal of plaintiffs' children without parental consent. The official agency manual authorized removal but failed to indicate that all such emergency removals must be promptly ratified by court order. Id. at 830-831. The Second Circuit permitted

the case to go to the jury on the question of whether the inadequate instructions caused the alleged constitutional removal of the children, id. at 832, and if so, whether the high level policy makers were entitled to a good faith defense. Id.

In the case at bar, plaintiffs have argued both a theory of liability against the Sheriff based on inadequate training and upon inadequate procedures and regulations, specifically failure of Gladwell to promulgate rules prohibiting the modification of weapons; the placing of firearms in "single-action" position; and clearly delineating when weapons may be drawn. (Pltf. Brief at 17, quoting Dr. Kirkham).

For purposes of the present motion for summary judgment, this court must

consider all evidence together with all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiffs. Smith v. Hudson, 600 F.2d 60, 63 (6th Cir. 1979). The affidavit of plaintiff's expert indicates that, in his view, based upon his experience, the Sheriff recklessly failed to properly train his deputies (see also Gladwell Dep. at 26-28), and recklessly failed to promulgate adequate regulations governing the use of guns. (Kirkham Afft. at 2-3. See also Pltf. Attachment 3). It cannot be said at this stage of the litigation that upon submission of all relevant facts to the jury, the Sheriff could not be found liable on either theory (i.e., reckless failure to train and/or creation of a custom or policy of reckless use of weapons). For this reason, summary judgment should not be granted.

D.

The County Commissioners

Plaintiffs seek to impose liability upon the county commissioners under two distinct theories. First, plaintiffs contend that the commissioners knew that the sheriff's department was underfunded and that the lack of funds prevented the hiring of qualified personnel and the proper training of the staff. Second, plaintiffs contend that the commissioners failed to act to correct known deficiencies in the department. This second theory, of course, presumes that the commissioners had some duty to affirmatively intervene in the department's internal matters. This assumption merits some scrutiny. As one court has stated:

> The Supreme Court in Monroe v. Pape held that "Section [1983] should be read against the background of tort liability

> that makes a man responsible for the natural consequences of his actions". . . . An essential element in tort liability is the breach of a legal duty owed by the wrongdoer to the injured party. Consequently, to recover under these statutes it is implicit that the alleged deprivation of civil rights must result from a breach of duty owed by the wrongdoer, and the duty must be one possessed by virtue of state law. Campbell v. Glenwood Hills Hospital, Inc., 224 F. Supp. 27, 32 (D. Minn. 1963) (emphasis supplied).

With respect to the first theory of liability, the law is clear that the commissioners have the duty to appropriate adequate funds for the administration of justice in the county. O.R.C. §§ 307.72, 325.07. See generally 20 O. Jur. 3rd § 279 (1980). Thus, if they knowingly or deliberately failed to appropriate the required sums, liability may well attach. The record in this case, however, is devoid of any evidence

that the commissioners knew of any critical fund shortage. Indeed, plaintiffs' sole citation to the record in support of this contention is the deposition of Sheriff Gladwell which reads:

> Q.: Would you discuss and did you discuss in '78 and '79 with the County Commissioners your attempt to secure, keep and train qualified deputies?
>
> A.: Well, yes.
>
> Q.: Did you discuss with them budgetary limitations?
>
> A.: To an extent.
>
> Q.: Did you tell them that keeping down the budget prevented you from achieving those goals?
>
> A.: Well, probably so, yes. (Gladwell Dep. at 21-22).

This testimony, by itself is, at best, ambiguous but on the following page of the deposition, not cited by plaintiffs, the Sheriff elaborated:

> Q.: During 1978 and 1979 did the County Commissioners

have discussions to [sic] you as to the operation of your department?

A.: There were some questions that arose, right.

Q.: Did these questions ever concern the supervision of the deputies?

A.: No.

Q.: What did they consist of?

A.: Well, different suggestions as well as I can recall, it was just minor things that was discussed. I can't recall any ones specific that was discussed. (Id. at 23).

Plaintiffs have offered no further citation to the record (and I can find none) that would suggest that the Commissioners had ever been approached by the Sheriff and requested to provide additional funding for training, hiring, or salaries and had denied the same. The executive officer of the sheriff's department testified that he was sure that if additional money was needed he could

request it from the Commissioners and would get it. (McDowell Dep. at 21-22, 33). He also testified that the department was not understaffed during 1979, the year the plaintiff's injury occurred. Id. at 27. Commissioner Vaith testified that he could not recall any discussion taking place with the commissioners regarding additional deputy training. This testimony is not contraverted by other facts of record. (Vaith Dep. at 26). In my view, the "underfunding" theory of liability is simply unsupported by the record. After depositions, requests for production, interrogatories and apparently satisfactory completion of discovery, the only testimony which might have supported plaintiffs' construction of the facts is the scant, ambiguous statements of the Sheriff that supervision of the

deputies was not discussed with the commissioners and that he could not recall any other specific suggestions that might have been. This is not enough to infer knowledge on the part of the commissioners. While it may be argued that the deputies lacked proper guidelines or training, there is no evidence that this (or the quality of the personnel) was causally related to the budget; that the budget was inadequate; or that the commissioners believed it to be. For these reasons, summary judgment should be granted defendant Commissioners on Count Five of the Complaint.

The second theory of liability pursued by plaintiffs is that the commissioners had a duty to intervene, using their budgetary and supervisory powers to correct the deficiencies of the defendant

Gladwell.* In my view, this is tantamount to charging the commissioners with the duty to usurp the sheriff's powers. Plaintiffs fail to cite any law which might require the commissioners to do so. Indeed, upon independent review of the pertinent Ohio law, it appears that the sheriff is an independent elected official vested with statutory duties which are not assigned to the commissioners. O.R.C. §§ 311.01, 311.07. The sheriff is not subject to the general supervision and control of the commissioners. Rather, he is the chief law enforcement officer in the county. 49 O. Jur. 2d §2 (1961). It is his responsibility to

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*It is also argued that the commissioners had a duty to train the deputies under O.R.C. § 307.55. This statute, however, merely permits the commissioners to operate a training school. According to the uncontradicted testimony of executive officer McDowell, the Erie County Sheriff's department utilized the training school of the Sandusky Police Department. (Depo. at 16).

appoint deputies. O.R.C. § 311.05. While the commissioners may take it upon themselves to intervene voluntarily and exercise whatever budgetary power might be effective, Ohio law, as I see it, does not compel them to do so. Failure to act may leave the county exposed to liability for the sheriff's conduct. See Hays v. Jefferson County, Kentucky, supra, 668 F.2d at 875. Nevertheless, a choice not to intervene does not thereby render the commissioners liable.

In one respect, however, the commissioners appear to have a duty to exercise control over the sheriff. Section 305.03 of the Ohio Revised Code expressly requires that in case of excessive absenteeism on the sheriff's part, the county commissioners "shall" declare the sheriff's office vacant and appoint a successor pending further election. See also

49 O. Jur. 2d §11 (1961). The record now before the court clearly demonstrates that the commissioners had knowledge of excessive absenteeism on the part of Sheriff Gladwell during 1978 and 1979. (Vaith Dep. at 11, 14). The reasons for such absence, however, are not clear, and specific dates are not provided. Yet it is clear that the commissioners had some knowledge of the reputed deterioration of the department and that other persons had to act in the sheriff's stead. This presents an issue of fact that could well affect any liability on the part of the commissioners. If excessive absenteeism triggered the commissioner's duty to replace Sheriff Gladwell under O.R.C. § 305.03 and if his absenteeism is causally related to the absence of proper regulations, control or supervision (a not illogical inference), liability may

well attach. While they generally possess no authority to run the department, under the circumstances the commissioners may have had an affirmative duty to act. For this reason, the defendant commissioners are not entitled, as a matter of law, to summary judgment on count 3 & 5 of the complaint.

E.

Pendant State Law Claims

Defendants argue that plaintiffs' state law claim (count 4) must be dismissed since, on its face, it fails to state a claim upon which relief can be granted. Plaintiffs allege a negligent failure on the part of the commissioners to secure adequate insurance to compensate for the injuries to the plaintiff. Plaintiffs rely on O.R.C. §§ 307.441(B), (D), (E). Those sections, however, simply permit the commissioners to acquire

liability insurance for themselves, the sheriff and his deputies. Subsection (F) requires that insurance must be purchased for all county officials if it is purchased for some, assuming coverage is "reasonably available".

Nothing in these code sections requires procurement of an amount of coverage in any specific amount. Indeed, the record here discloses that insurance was procured to cover the incident in question and in amounts that appear reasonable on their face--$100,000.00 per person, $300,000.00 per incident. (See Pls. Ex. 12, Answer to Interrogatories directed to Sheriff). Plaintiffs have pointed to no statutory or common law duty to procure liability coverage above that which was in fact obtained. Indeed, plaintiffs fail even to respond to defendants' motion for summary judgment on

this claim. For these reasons, defendants should be granted judgment dismissing this claim.

Defendant additionally argues that plaintiffs June and Richard Leber cannot recover for monies expended for the care and aid of their son, Eugene, and the loss of his services, since he is not a minor child. Plaintiffs respond that by virtue of contract, Eugene's parents provided aid and medical assistance and that, in turn, they have a right to Eugene's services. Thus, in their view they are entitled to recover this from the alleged wrongdoer. The sole authority cited is Lind v. Zeisel, 26 O. App. 439 (1927), a case instituted by a physician seeking to hold a father liable for the medical expenses of his adult daughter. The court denied the doctor recovery holding that, absent an express or

implied promise to pay, the father had no liability to the doctor for medical expenses of a child over 21 years of age. Id. at 441.

From this limited holding, plaintiffs seek to infer a parental right of indemnification for medical expenses paid on behalf of their adult child (as well as a claim for loss of services). There is little in Lind that would support such a contention, for Lind involved the much simpler question of whether a promise to pay had been made directly between the father and the doctor. In the case at bar, the issue is really whether an implied contract between the parents and their adult child can form the basis for an indemnification claim against a third party. Whether such a contract existed in the first place, as well as the scope of such contract is, in part, a factual

issue. Moreover, the enforceability of such a claim has been briefed in only the most cursory fashion. For this reason, the Court should reserve judgment on this issue pending further briefing and the submission of additional evidence.

Finally, it is noted with some concern that plaintiffs assume that a pendent state law claim has been pled against defendant sheriff based upon O.R.C. § 311.05. While such a claim is cognizable under Ohio law, see, e.g., Jenkins v. Krieger, 67 Ohio St. 2d 314 (1981), no single count of the complaint could fairly be construed to state such a claim. Count Five cites § 311.05 but is stated as a claim against the commissioners under § 1983 for failure to allocate funds to train and equip the deputies which allegedly resulted in deprivation of plaintiff Eugene Leber's rights.

F.

Good Faith Immunity

Defendants argue that they are entitled to judgment based on their assertion of good faith immunity. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967). In support thereof, it is argued that deputy Smith clearly had authority to pursue and retain plaintiff and that the deputy had the right "to exercise reasonable precautions for his own safety." (Defs. Brief at 14). No argument is advanced for the application of good faith immunity to the Sheriff on (sic) the Board of Commissioners.

A motion for summary judgment can, of course, prove a useful tool in disposing of insubstantial claims against public officials, Harlow v. Fitzgerald, ____

U.S. ____, 102 S. Ct. 2727, 2739 (1982); Butz v. Economou, 438 U.S. 478, 508 (1978), in appropriate circumstances. This court, however, is not empowered to try issues of fact upon a motion for summary judgment. Watkins v. Northwestern Ohio Tractor Pullers Association, Inc., 630 F.2d 1155, 1158 (6th Cir. 1980). Such determination remains the province of the jury. In the instant action, the "reasonableness" of defendant Smith's actions is the central factual issue. Thus, it would be clearly inappropriate for the Court to resolve this issue upon summary judgment.

For all the foregoing reasons, it is therefore

RECOMMENDED that the motion for summary judgment be:

1. granted as to defendant Board of County Commissioners on Counts 3 and 5

insofar as those counts involve underfunding; and as to Count 4; and

2. denied in all other respects as to defendants Board of Commissioners, sheriff and deputy sheriff.

SO RECOMMENDED.

/s/ JAMES G. CARR

United States Magistrate

APPENDIX B

Order of the District Court

(Filed April 29, 1983)

Case No. C79-288

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Western Division

EUGENE A. LEBER, et al.,

Plaintiffs,

vs.

STEVEN A. SMITH, et al.,

Defendants.

ORDER

POTTER, J.:

This cause was transferred to the United States Magistrate for a Report and Recommendation. Magistrate James Carr filed his Report and Recommendation on January 17, 1983.

The Court has received the plaintiffs' and defendants' objections to the Report and Recommendation. Upon a review of the Magistrate's Report and Recommendation, the findings of the Magistrate, the record in this case, and the objections, the Court finds that the defendants' objections are well taken.

The defendants argue that the Magistrate improperly found that an issue of fact existed regarding the sheriff's excessive absenteeism. According to the Magistrate, the County Commissioners had a duty under O.R.C. §305.03 to declare a vacancy in the sheriff's office when the sheriff is out of the county for more than ninety days.

The Court has examined the record and finds that reasonable minds could reach but one conclusion on this issue. Although there is some evidence in the

record to indicate that Sheriff Gladwell was absent from his office during the time period in question, there is no evidence to indicate that Sheriff Gladwell was absent from the county for ninety days, thus making the provisions of O.R.C. 305.03 applicable. Therefore, the Court will grant defendant County Commissioners summary judgment on Counts 3 and 5 of the complaint.

Defendants also object to the Magistrate's finding that defendant Smith may be liable to plaintiffs under 42 U.S.C. §1983 for his negligent discharge of his firearm. According to defendant Smith, the Magistrate, in making this finding, has departed from existing law. The Magistrate held that the factual circumstances in the case sub judice presented a jury question on the issue of whether

defendant Smith acted reasonably in attempting to seize plaintiff Eugene Leber.

As the Magistrate points out in his Report and Recommendation, other courts which have considered similar factual situations have found no cause of action under 42 U.S.C. §1983 because there has been no deprivation of a constitutional right. See Miller v. Smith, 656 F.2d 337 (8th Cir. 1981); Polson v. City of Lee's Smmmit (sic), 535 F. Supp. 555 (W.D. Mo. 1982). Although the Court appreciates the Magistrate's efforts to bring some order to the confused state of the law in this area, the Court declines to adopt the recommendation of the Magistrate that defendant is not entitled to summary judgment on the issue of his liability under 42 U.S.C. §1983. Instead, the Court finds that there is no factual dispute as to the circumstances which

occurred at the time Eugene Leber's car was stopped and defendant Smith's gun accidentally discharged resulting in plaintiff Eugene Leber's injuries. The Court, therefore, finds that under these factual circumstances plaintiffs do not have a cause of action under 42 U.S.C. §1983 because there was no deprivation of plaintiff's constitutional rights and defendant Smith is entitled to summary judgment on this issue. Miller v. Smith, supra; Polson v. City of Lee's Summit, supra.

Finally, defendants object to the Magistrate's finding that the issue of defendant Smith's good faith immunity presents a jury question. Having held that plaintiffs have no cause of action against defendant Smith under 42 U.S.C. §1983, the Court does not reach the good faith issue in regard to defendant Smith.

In addition, having held that defendant Smith is entitled to summary judgment on the issue of his liability to plaintiffs under 42 U.S.C. §1983, the Court also finds that plaintiffs have failed to state a claim against defendant Gladwell based upon defendant Gladwell's reckless failure to properly train his deputies or to promulgate adequate regulations covering the use of guns. Therefore, the Court will grant summary judgment as to defendant Gladwell.

There remain pendant state claims against defendants. Having held that plaintiffs have failed to state any federal claim, this Court will decline to exercise jurisdiction over those pendant state claims. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Nash & Associates, Inc. v. Lums of Ohio, Inc., 484 F.2d 392, 396 (6th Cir. 1973); Mid-

State Food Dealers Ass'n. v. City of Durand, 525 F. Supp. 387, 392 (E.D. Mich. 1981).

THEREFORE, for the reasons stated, good cause appearing, it is

ORDERED that said Report and Recommendation be, and the same hereby are, adopted in part as the Order of this Court in this case; and it is

FURTHER ORDERED that defendants' motion for summary judgment be, and it hereby is, GRANTED as to all defendants; and it is

FURTHER ORDERED that plaintiffs' pendant state claims be, and they hereby are, DISMISSED.

IT IS SO ORDERED.

/s/ JOHN W. POTTER

United States District Judge

APPENDIX C

Opinion of the Court of Appeals

(Decided and Filed September 20, 1985)

No. 83-3387

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

EUGENE A. LEBER; RICHARD P. LEBER; and JUNE M. LEBER,

Plaintiffs-Appellants,

vs.

STEVEN A. SMITH; Sheriff, Erie County, WANDA JUNE GLADWELL, Admx.; BOARD OF ERIE COUNTY COMMISSIONERS,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio.

Before: ENGEL and KENNEDY, Circuit Judges; and PECK, Senior Circuit Judge.

PECK, Senior Circuit Judge. This case is before the court upon an appeal

from the order of the district court granting summary judgment in favor of the appellees in an action brought under 42 U.S.C. § 1983. Appellants' amended complaint consisted of six counts, including § 1983 claims against the Erie County Sheriff, an Erie County Sheriff's Deputy, the Board of Erie County Commissioners, and the individual Board members. Various pendent state claims were also asserted.

In the early morning hours of April 7, 1979, the Erie County Sheriff's Department received a telephone call from Richard Leber, the brother of appellant Eugene A. Leber. Richard expressed concern that his brother might attempt to commit suicide. In response, Deputy Sheriff Steven A. Smith and Sargeant Stanley C. Barrett went to the Leber

residence, but Eugene Leber had already driven away. Richard once again indicated that he was concerned about his brother, who had been drinking, and wanted him brought home. Based upon information given to them by Richard, Barrett and Smith, in separate vehicles, began to search for Eugene Leber. Upon sighting Leber's vehicle, a high speed chase ensued. A Milan, Ohio, police officer who had been alerted by radio set up a partial roadblock which was successful in stopping Leber's car. Sargeant Barrett pulled up behind Leber's vehicle, got out with his gun drawn, and ordered Leber to exit his car, but Leber did not respond. Deputy Smith then arrived in his vehicle and stopped parallel to Leber's car. With gun drawn, Smith got out and began to run around the front of

his vehicle.[1] He slipped on a patch of ice, stumbled, and accidentally discharged his weapon as he fell. Leber was struck by the bullet and as a result is permanently paralyzed below the level of his rib cage.

Leber[2] initiated this lawsuit, naming as defendants Smith and Erie County Sheriff Harold Gladwell[3] in both their individual and official capacities, the Board of Erie County Commissioners, and the individual Board members. Leber

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[1]Smith's weapon was a new Colt Python .357 Magnum which had never been fired; he had purchased it a short time before the accident. Smith had modified the weapon by adding a "trigger shoe," a device which attaches to the trigger and provides a larger surface area on the trigger. Smith testified that he did not cock the gun as he approached the Leber vehicle.

[2]Leber's parents were also named as plaintiffs. They asserted a claim for medical expenses and loss of services.

[3]Sheriff Gladwell died after the action was filed in district court; the administratrix of his estate was substituted as a party.

alleged that Smith was acting on his own behalf and on behalf of Sheriff Gladwell and the Board of Commissioners when Leber was shot, and that the shooting occurred in furtherance of custom established by the Board. He asserted that the actions by Smith, Gladwell and the Board were in violation of 42 U.S.C. § 1983, and that Smith's actions were grossly wanton and reckless. He further alleged that the Board and its members were negligent and violated duties imposed upon them by the Ohio Revised Code in failing to exercise greater budgetary and financial responsibility and control in the equipping and training of the deputies of the Erie County Sheriff's Department, and in failing to secure an adequate amount of insurance coverage against liability for the Sheriff's Department.

Motions for summary judgment by all defendants were referred to a magistrate for report and recommendation. As to Smith's liability under § 1983, the magistrate determined that the constitutional right in issue was the Fourth Amendment right against unreasonable searches and seizures. The magistrate concluded that because the issue of whether Smith's action in attempting to seize Leber was reasonable was a disputed question of fact, summary judgment was inappropriate on the issues of Smith's § 1983 liability. As to Sheriff Gladwell's liability, the magistrate found that summary judgment was inappropriate because, under the facts as alleged, the Sheriff could be found liable for reckless failure to train and/or failure to create a custom or policy on the use of weapons. The magistrate recommended that

summary judgment should be granted to the Board and the Commissioners on the count alleging failure to appropriate the required sums. Leber had also alleged that the Commissioners had a duty under Ohio Revised Code § 305.03[4] to take action because of excessive absenteeism by Sheriff Gladwell. Because the record indicated that the Commissioners had some knowledge of Sheriff Gladwell's frequent absence, the magistrate found that summary judgment was inappropriate on that issue.

The district court, however, concluded that because there was no evidence

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[4]Section 305.03 provides in pertinent part:

> Whenever any county officer is absent from the county for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of county commissioners shall declare a vacancy to exist in such office.

in the record to indicate that Sheriff Gladwell was absent for ninety days, ORC § 305.03 was inapplicable and thus the Commissioners were entitled to summary judgment. Further, the district court held that Smith was entitled to summary judgment on the § 1983 claim because under the undisputed factual circumstances surrounding the shooting, there was no deprivation of a constitutional right. The court also held that Leber had failed to state a claim against Gladwell for reckless failure to properly train his deputies or to promulgate adequate regulations concerning the use of guns. Finally, having concluded that Leber failed to state any federal claim, the court declined to exercise jurisdiction over the pendent state claims.

On June 24, 1983, Leber filed a complaint in the Court of Common Pleas of

Erie County, Ohio, which contained claims for common law negligence, gross negligence, recklessness, violation of duties imposed by Ohio statutes, and for the deprivation of rights secured by the Ohio Constitution. The complaint was based on the same incident as the instant action, and involved the same parties. A jury verdict and a judgment were entered in the Common Pleas Court, adjudicating the state common law liability of all defendants. Thus, the only claims on appeal are federal claims pursuant to § 1983. Leber alleges that he has been deprived of liberty without due process of law under the due process clause of the Fourteenth Amendment and that his Fourth Amendment right to be secure in his person against unreasonable searches and seizures has been violated.

In the recent opinion of Wilson v. Beebe, 770 F.2d 578 (6th Cir.1985) (en banc), this court was faced with a very similar fact situation. Wilson, the plaintiff, was injured when the gun of the defendant, Beebe, a Michigan state police officer, discharged as Beebe was attempting to handcuff Wilson during an arrest. Wilson brought suit against Beebe and others,[5] seeking damages under § 1983 and under a pendent state claim of negligence. The district court held that there was no cause of action under § 1983, but that Wilson was entitled to recover under his pendent state claim. Upon appeal, a panel of this court reversed

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[5]Wilson also sued two supervisory officers. In an interlocutory appeal, this court affirmed the district court's dismissal of the counts pertaining to the supervisory officers because the complaint did not allege that those officers had a direct responsibility for the action of Officer Beebe. Wilson v. Beebe, 612 F.2d 275 (6th Cir. 1980).

the dismissal of the § 1983 claim and remanded to the district court. 743 F.2d 342 (6th Cir.1984). Upon rehearing en banc, the court held that Wilson had failed to establish a cause of action under § 1983. Before reaching this conclusion, the court first determined that Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), applies to cases involving deprivations of liberty interests as well as of property. In Parratt, the Supreme Court held that there is no cause of action for the random, unauthorized acts of a state official which deprive a person of property if the state provides an adequate postdeprivation remedy. Applying Parratt, the court in Wilson v. Beebe concluded that the conduct of Officer Beebe in arresting Wilson was contrary to established state procedure and training

and was thus a "random and unauthorized act." Next, the court noted that the district court had applied the substantive law of Michigan to Wilson's pendent claim for negligence and had awarded substantial damages. Thus, the court concluded, the State of Michigan provided an adequate post-deprivation remedy. Addressing the issue of whether Wilson was entitled to prevail under § 1983 on a substantive due process claim, the court concluded that Wilson did not plead or prove a "violation of the Fourth Amendment right to be free of unreasonable seizures or any other substantive right specified in the Constitution." Wilson, at 586. Finally, the court concluded that a substantive due process violation based upon official conduct which "shocks the conscience" requires an intentional, rather than a negligent act.

Although several differences exist between Wilson v. Beebe and the present case, we conclude that Wilson v. Beebe is dispositive. Here, as in Wilson v. Beebe, the conduct of the arresting officer was random and unauthorized and not the result of an established state procedure.[6] As to whether the State of Ohio provides an adequate postdeprivation remedy, the jury in the state court proceedings awarded over $10,000,000.00 to Leber and $150,000.00 to his parents.

One distinction between Wilson v. Beebe and the present case which merits discussion is that Wilson v. Beebe was

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[6] In Wilson v. Beebe, the district court had found that Officer Beebe acted contrary to his training in cocking his pistol while attempting to handcuff Wilson. In the present case, the rules and regulations of the Erie County Sheriff's Department provided that firearms should be drawn only when necessary, and further provided that weapons should be used to effect an apprehension only as a last resort. Based on this policy, it cannot be said that Smith drew his gun pursuant to established procedure.

"not tried or pleaded as one for the violation of the Fourth Amendment right to be free of unreasonable searches or any other substantive right specified in the Constitution." Wilson, at 586. In the case at bar, however, it appears that the Fourth Amendment issue was raised early in the proceedings; the magistrate's report and recommendation stated that the right at issue was the plaintiff's Fourth Amendment right to be secure in his person against unreasonable searches and seizures. In Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985), the Supreme Court stated that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." In Wilson v. Beebe, the court found that Wilson had only alleged

a violation of his due process rights subsequent to his arrest, after the seizure was complete, and thus had not based his due process claim on the reasonableness of his arrest. In the instant case, however, it appears that a basis of Leber's due process claim is that the seizure was unreasonable in violation of the Fourth Amendment. As the magistrate noted in his report and recommendation, it is undisputed that the officers were engaged in a "seizure" of Leber as that term is used in the Fourth Amendment. See Mendenhall v. United States, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). The issue we must address, then, is whether Deputy Smith's actions were "reasonable" under the Fourth Amendment. It is undisputed that Smith unintentionally discharged his weapon as he slipped and fell; the ques-

tion is whether he acted reasonably in drawing his gun. Deputy Smith, in an affidavit, stated: "It is not normal procedure to draw a weapon on a routine traffic stop, but I did so in this case because of the high speed pursuit, the report that Leber was possibly irrational and suicidal, and because it was dark." Deputy Smith, in his deposition testimony, further stated that he drew his gun because the actions of an emotionally disturbed, possibly suicidal, intoxicated person are unpredictable. Considering the factual circumstances surrounding the incident in question, we are unwilling to conclude that Deputy Smith acted unreasonably in drawing his weapon while approaching Leber's vehicle. Thus, we conclude that Leber failed to establish a substantive due process violation.

Because Leber has failed to establish either a procedural or a substantive due process violation, we hold that the district court correctly concluded that as a matter of law there existed no claims under § 1983 against Deputy Smith, the Sheriff, the Board or the Commissioners. Having reached this conclusion, we need not consider the issue of good faith immunity in regard to Smith.

Accordingly, we affirm the order of the district court granting summary judgment.

APPENDIX D

Order of the Court of Appeals

(Filed November 6, 1985)

No. 83-3387

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

EUGENE A. LEBER, et al.,

Plaintiffs-Appellants,

vs.

STEVEN A. SMITH, et al.,

Defendants-Appellees.

Appeal from United States District Court for the Northern District of Ohio.

BEFORE: ENGEL and KENNEDY, Circuit Judges, and PECK, Senior Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

original panel members but also to all other actuve (sic) judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

While the panel adheres to its original disposition, it is ORDERED that beginning at line 11 from the bottom on page 7 the sentence be modified to read as follows:

> "Deputy Smith, in his deposition testimony, further stated that he drew his gun because the actions of an emotionally disturbed, possibly suicidal person are unpredictable."

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

John P. Hehman, Clerk

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were served upon each of the respondents in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 29th day of January, 1986, addressed as follows:

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Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
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SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1294

EUGENE A. LEBER, ET AL.,

Petitioners,

V.

STEVEN A. SMITH, ET AL.

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1-4

SUMMARY OF ARGUMENT 5

ARGUMENT 6-18

I. ANY IMPORTANT QUESTIONS OF FEDERAL LAW HAVE NOW BEEN DECIDED BY THIS COURT 6-9

II. THE COURT OF APPEALS DID NOT DECIDE A FEDERAL QUESTION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT 9-10

III. ALLEGED ERROR BY THE COURT OF APPEALS 10-18

A. THE COURT OF APPEALS DID NOT ERR 11-16

1. ALLEGED ERROR IN FAILING TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES 11-14

2. ALLEGED ERROR IN FAILING TO CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS 14-16

B. THE ALLEGED ERROR OF THE COURT OF APPEALS INVOLVED MATTERS OF INTEREST ONLY TO THE PARTIES 16-17

C. ANY ERROR OF THE COURT OF APPEALS IS NOW MOOT 17-18

CONCLUSION 19

CERTIFICATION 20

TABLE OF AUTHORITIES

CASES **PAGE**

Daniels vs. Williams, 54 U.S.L.W. 4090, (U.S. Jan. 21, 1986) 7,8,11,17

Davidson vs. Cannon, 54 U.S.L.W. 4095, (U.S. Jan. 21, 1986) 7,8,11,17

Leber vs. Smith, 773 F.2d 101 (6th Cir., 1985) . . . 4,14,15

Layne and Bowler Corp. vs. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923) 17

Mills vs. Smith, 656 F.2d 337 (8th Cir., 1981) 11

Polson vs. City of Lee's Summit, 535 F. Supp. 555 (W.D. Mo. W.D., 1982) 11

Rice vs. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955) 17

Tennessee vs. Garner, 471 U.S. __, 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985) 9

Wolf vs. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L.E. 1782 (1949) 8

STATUTES

U.S. Constitution, Fourth Amendment 8,9,11,12,14,17

U.S. Constitution, Fourteenth Amendment 7,8

42 U.S.C. §1983 5,7,8,9

Federal Rules of Evidence, Rule 702 16

Supreme Court Rules, Rule 17 6

STATEMENT OF THE CASE

The evidence adduced in the District Court, fairly given in the light most favorable to petitioners, shows that at approximately 4:30 a.m. on the morning of April 7, 1979 respondent Steven A. Smith, a deputy with the Erie County, Ohio Sheriff's Department, received a radio dispatch of a possible suicide at petitioners' house.

When Smith and a fellow deputy sheriff named Barrett arrived at the Leber house they were met by Richard Leber, who informed Smith and Barrett that his brother, petitioner Eugene Leber, had just left the Leber residence in his automobile. Richard Leber wanted his brother apprehended and brought home because in a conversation with Eugene Leber a few minutes earlier Eugene Leber had said something about contemplating suicide. Although Eugene Leber did not actually use the phrase "commit suicide", his brother was afraid that that was his intention.

Petitioner Eugene Leber admitted in deposition that prior to the accident he had treated with his family doctor for a nervous condition and had visited

a psychiatrist on one occasion. Eugene Leber also admitted that during the evening and early morning hours of the night in question he had conversations both with his brother, Richard, and with his ex-girlfriend that led them to believe that he might be going out to "do something" to himself. Leber further admitted that prior to the incident in question he had been drinking.

Richard Leber did not tell the two sheriff deputies that his brother had been drinking or was intoxicated; however, Smith inferred that Eugene Leber had been drinking and may have been intoxicated as his brother was and Smith surmised that Eugene and his brother had been to the same party.

Shortly after the conversation with Richard Leber, Deputy Smith and Barrett, in separate vehicles, spotted Eugene Leber operating his automobile along a rural county road. Leber knew that the deputies wanted to question him and attempted to evade them. A high speed chase involving speeds of up to 75 m.p.h. ensued until Eugene Leber brought his vehicle to a stop in front of a partial roadblock.

Barrett brought his police vehicle to a stop behind the Leber auto and shined a spotlight on it. Smith

positioned his police vehicle adjacent to and slightly behind Leber's car and got out drawing his revolver.

Although Leber was ordered on at least two occasions to get out of his vehicle he did not do so.

Smith testified by way of affidavit and deposition that he drew his revolver as a precaution because of the high speed pursuit, the report that Leber was suicidal, because it was dark and he could not fully see what Leber was doing inside the vehicle, and because he figured that no one's life meant very much to a person who might be suicidal and he wasn't sure whether Leber had a gun or other weapon.

While moving around the front of his vehicle Smith, who was holding his revolver uncocked and pointing upward, slipped and fell causing the weapon to discharge.

There was no dispute by any of the parties as to the Magistrate's finding that:

> "... Smith did not intend to fire his weapon at the plaintiff. As he exited the car, it was not aimed at the plaintiff, and, but for Smith's slipping on the ice, the pistol would not have fired."

On April 29, 1983 the motion of respondents for summary judgment was granted by the District Court and the complaint was dismissed. The District Court

held that the accidental discharge of the gun by Smith did not deprive plaintiff of any constitutional rights.

On June 24, 1983 petitioners filed a complaint in the Erie County Court of Common Pleas based upon the same incident and involving the same parties.

The order of the District Court granting summary judgment was affirmed by the U.S. Court of Appeals for the Sixth Circuit on September 20, 1985. The Court of Appeals noted in its decision that while such appeal was pending petitioners had received a jury award in the state court action in excess of $10,000,000.00, Leber vs. Smith, 773 F.2d 101 (1985) at pages 103-104.

SUMMARY OF ARGUMENT

A writ of centiorari should be denied because the petition does not set forth any special and important reasons for review. Specifically, the Court of Appeals did not decide an important question of federal law which has not been but should be settled by this Court nor did it decide a federal question in a way in conflict with any applicable decision of this Court. Petitioners' contentions that the Court of Appeals failed to consider the totality of the circumstances in testing the reasonableness of respondent Smith's activities at the time of the accident and that the Court of Appeals erred in failing to view the evidence in the light most favorable to petitioners are incorrect. Review of such alleged errors by this Court would not resolve issues of public importance. In addition, such alleged errors are also moot in view of this Court's recent decisions holding that negligent activities of state officials do not give rise to a 42 U.S.C. §1983 action.

ARGUMENT

Review on writ of certiorari is not a matter of right. Such review is within this Court's judicial discretion. A writ will not be granted unless petitioners can show that there are special and important reasons for review. The special and important reasons for which this Court will usually entertain review on certiorari are set forth in Supreme Court Rule 17.

Of the reasons ennumerated in Rule 17, this petition only colorably implicates the reasons contained in Rule 17.1(c) which states in relevant part that the court may exercise its judicial discretion to grant review:

> "When . . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

I. ANY IMPORTANT QUESTIONS OF FEDERAL LAW HAVE NOW BEEN DECIDED BY THIS COURT

Petitioners have not articulated a claim that the Court of Appeals ruling in this case decided an important question of federal law which has not been but should be settled by this court. In the event that

this is the basis upon which petitioners seek review, two companion cases recently decided by this court, in factual settings almost identical to this case, clarify that any important questions of federal law decided by the Court of Appeals have now been settled by this court. In Daniels vs. Williams, 54 U.S.L.W. 4090 and Davidson vs. Cannon, 54 U.S.L.W. 4095, decided January 21, 1986, both petitioners, who were prison inmates, brought §1983 actions for personal injuries they had received due to the negligence of prison officials, alleging that such officials deprived them of a liberty interest secured by the Due Process Clause of the Fourteenth Amendment. In both cases this Court held that no cause of action may be maintained under §1983 for negligent infliction of personal injuries by a state official.

This court has now clarified that negligent conduct on the part of state officials does not give rise to a §1983 action for personal injuries:

> "In Daniels, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an offical causing unintended injury to life, liberty or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required. * * * As we held in Daniels, the

> protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." Davidson, supra, at 4095-4096.

While neither Daniels nor Davidson alleged that their injuries were sustained in violation of their Fourth Amendment rights as has petitioner Eugene Leber, the Daniels and Davidson cases demonstrate that petitioners in this case improperly brought a §1983 action notwithstanding the allegation of a Fourth Amendment deprivation. Fourth Amendment rights are only enforceable against the states by reason of the Due Process Clause of the Fourteenth Amendment. Wolf vs. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L.E. 1782 (1949). This Court has now established that the protections of the Due Process Clause, whether procedural or substantive, are simply not triggered by lack of due care on the part of state officials. Since a Fourth Amendment claim against state officials depends upon the protections afforded by the Due Process Clause, it follows that a negligent violation of the Fourth Amendment also does not give rise to a §1983 action.

Because this Court has now settled an important question of federal law by holding that mere negli-

gence on the part of state officials does not trigger a cause of action under §1983, which question had not been addressed by this Court at the time the Court of Appeals ruled on this case, review on certiorari is inappropriate.

II. THE COURT OF APPEALS DID NOT DECIDE A FEDERAL QUESTION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT

The primary basis for certiorari review asserted by the petition is that the Court of Appeals decided this case in conflict with an applicable decision of this Court. The allegedly applicable decision of this Court with which petitioners allege the Court of Appeals decision conflicts is Tennessee vs. Garner, 471 U.S. __, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985).

Garner, however, is neither a decision applicable to the facts or law involved in the instant case nor is the Court of Appeals decision in conflict with it. Garner decided the constitutionality of a Tennessee statute permitting intentional use of deadly force in apprehending a suspected felon and held that a police officer violates a suspected felon's Fourth Amendment rights by using deadly force unless the

officer has probable cause to believe that the suspect either poses a threat to the safety of the officer or a danger to the community if left at large. The present case involves no statute. Nor does it involve an intentional shooting. All of the parties concede that the shooting of Eugene Leber was an unintended accident.

Based upon the foregoing, this Court should deny review on certiorari as the Court of Appeals decision was not in conflict with any applicable decision of this court.

III. ALLEGED ERROR BY THE COURT OF APPEALS

The petition asserts two subsidiary reasons why this Court should review this case on certiorari: (1) That the Court of Appeals, in testing the reasonableness of Deputy Smith's activities at the time of the shooting, did not consider the totality of the circumstances; and (2) That the District Court and the Court of Appeals erred to the prejudice of petitioners by failing to view the evidence adduced in the light most favorable to them.

Respondents contend that these two instances of alleged error should not be addressed by the Court on

certiorari review because: (1) there was no such error; (2) such alleged error involves matters of interest only to the parties; and (3) such alleged error was rendered moot by the Daniels and Davidson decisions.

A. THE COURT OF APPEALS DID NOT ERR

1. ALLEGED ERROR IN FAILING TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES

With respect to petitioners' claim that a special and important reason for review by this Court results from the alleged error of the Court of Appeals in failing to consider the totality of the circumstances, it should be noted that both the District Court and the Court of Appeals reached the same result (that petitioners' complaint was properly dismissed) via slightly different reasoning. The District Court, following Mills vs. Smith, 656 F.2d 337 (8th Cir., 1981) and Polson vs. City of Lee's Summit, 535 F. Supp. 555 (W.D. Mo. W.D., 1982), held that since the shooting of Leber was accidental or at most the result of mere negligence, Leber's Fourth Amendment rights were not violated. The District Court held that a higher

mental state of culpability was required to implicate the Fourth Amendment. The approach of the Court of Appeals was to test the activities of Smith to determine whether his actions were "unreasonable". While respondents asserted in the lower courts that the reasoning of the District Court was most appropriate, the difference in approach taken by the trial court and the Court of Appeals is immaterial since the result was properly the same under either analysis.

If the reasoning of the District Court was correct, the amended complaint was properly dismissed as petitioners cannot seriously contest that the evidence, even viewed in the light most favorable to them, showed, at the very most, mere negligence on Deputy's Smith's part. On the other hand, if the Court of Appeals was correct in assessing the Fourth Amendment aspects of Smith's conduct on the basis of whether or not the activities were "unreasonable", the record fully supports the Court of Appeals' finding that his actions were reasonable as a matter of law.

Petitioners assert that the Court of Appeals erred in testing the reasonableness of Smith's conduct

by considering such conduct only up until the moment Smith pulled his uncocked handgun. According to petitioners, assessment of the totality of the circumstances should have included Smith's activities during the second or two between when Smith drew his weapon and when he slipped and fell.

Stripped down to its bare essentials, petitioners' contention is that the Court of Appeals erred in failing to consider whether Smith's approach to Leber's car was reasonable. In view of the fact that the roadway ahead was only partially obstructed by a police roadblock and that Smith's purpose in briskly moving toward the Leber vehicle was to prevent, as quickly as possible, Leber's eluding the officers once again by driving away, it is difficult to comprehend how Smith's haste in reaching the Leber vehicle raised a jury issue as to reasonableness. In fact, since no one can fairly say that Smith would not have stumbled even had he adopted a slower and more deliberate approach, the speed of his movement was simply not relevant to any of the issues in this case.

Moveover, a careful review of the Court of Appeals decision does not show, as petitioners contend, that

the Court of Appeals failed to consider the reasonableness of Smith's activities in the brief moment after he drew his gun before it discharged. While the Court may have focused upon Smith's decision to draw his gun, it recognized that, "The issue we must address . . . is whether Deputy Smith's actions were 'reasonable' under the Fourth Amendment." Leber, supra, at page 105 (emphasis supplied).

2. ALLEGED ERROR IN FAILING TO CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS

The final basis contended by petitioners as providing a special and important reason for this Court's exercise of discretion to review this case is that the trial and appellate court erred in failing to view the evidence in the light most favorable to petitioners by picking and choosing only the facts which were favorable to respondents.

As evidence of this alleged improper fact finding, petitioners assert that the Court of Appeals improperly characterized Eugene Leber as intoxicated (Petition, page 23). An examination of the opinion of the Court of Appeals will reveal that it did not

characterize Leber as intoxicated. The original opinion referred to Smith's deposition testimony that Smith "drew his gun because the actions of an emotionally disturbed, possibly suicidal, intoxicated person are unpredictable", Leber, supra, at page 105. The Court of Appeals, far from characterizing Leber as intoxicated, quite properly focused upon what Smith thought to be Leber's condition. Moreover, after petitioners' petition for rehearing and rehearing en banc was denied the panel modified its opinion by eliminating the reference to Leber's intoxication.

Next, petitioners assert that the Court of Appeals improperly found Leber to have been emotionally disturbed and possibly suicidal (Petition, page 23). Again, the Court of Appeals made no such finding nor was it required to since Leber's mental state was not relevant. The Court of Appeals very correctly focused upon what Smith reasonably thought Leber's mental state to be at the time of the incident.

Finally, petitioners contend that the Court of Appeals failed to consider the affidavit of petitioners' expert introduced into evidence in the trial court which contained conclusory statements concerning

the quality of Smith's actions and his mental state at the time of the incident.

The District Court properly granted summary judgment notwithstanding the affidavit. The affidavit did not raise any material issues of contested fact. Moreover, the District Court could properly disregard the opinions expressed in the affidavit either because they were excludable under Rule 702 of the Federal Rules of Evidence as not requiring scientific, technical, or other specialized knowledge to assist the trier of fact, or because the expert's opinions were entitled to no evidentiary weight since the opinions invaded the province of the trial court to decide legal issues.

B. THE ALLEGED ERROR OF THE COURT OF APPEALS INVOLVED MATTERS OF INTEREST ONLY TO THE PARTIES

Any error of the Court of Appeals which petitioners have put forward to this Court as a basis for review on certiorari involves matters of interest only to the parties. This court has long been:

> ". . . consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the

public as distinguised from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals." Layne and Bowler Corp. vs. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923); followed and approved in Rice vs. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

C. ANY ERROR OF THE COURT OF APPEALS IS NOW MOOT

Certiorari would be particularly inappropriate in this case, since the alleged error of the Court of Appeals in failing to consider the totality of the circumstances and evidence favorable to petitioners has now been rendered moot by Daniels and Davidson.

The evidence adduced in the District Court demonstrated that the shooting of Eugene Leber, was, at most, the result of mere negligence. The Court of Appeals focused upon whether the activities of Deputy Smith were "unreasonable" under the Fourth Amendment, when it need only have determined whether the District Court's finding of mere negligence was supported by the evidence. Since even petitioners do not challenge the trial court's finding of negligence, the Court of Appeals analysis of

whether Smith's activities were reasonable was superfluous.

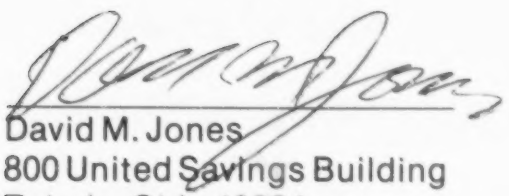
Accordingly, even if the Court of Appeals improperly failed to consider the totality of the circumstances and certain evidence favorable to petitioners, such error is moot.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EASTMAN & SMITH



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CERTIFICATION

I hereby certify that three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari were served upon counsel for petitioners by sending same by ordinary mail, postage prepaid, on the 27 day of February, 1986, to:

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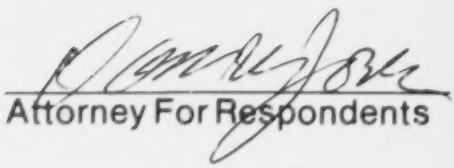

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